

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 24, 2012

v

MARKEITH DARELL CANADA,

Defendant-Appellant.

No. 303476
Kent Circuit Court
LC No. 10-008909-FH

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of being a felon in possession of a firearm, MCL 750.224f. He was sentenced as an habitual offender, second offense, MCL 769.10, to two to seven and one-half years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in denying his motion to suppress evidence resulting from the execution of a search warrant. Defendant contends that the affidavit supporting the warrant was insufficient. "A trial court's findings of fact on a motion to suppress are reviewed for clear error, while the ultimate decision on the motion is reviewed de novo." *People v Hrlic*, 277 Mich App 260, 262-263; 744 NW2d 221 (2007). When reviewing a magistrate's finding that probable cause existed to support a search warrant, we ask, given the totality of the circumstances, "whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *People v Russo*, 439 Mich 584, 603, 608; 487 NW2d 698 (1992).

A search warrant may only be issued upon a showing of probable cause. US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651(1). Probable cause exists if there is a substantial basis for inferring a fair probability that contraband or evidence of a crime exists in the stated place. *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). Probable cause must be based on facts presented to the issuing magistrate by oath or affirmation, such as by affidavit. *People v Wacławski*, 286 Mich App 634, 698; 780 NW2d 321 (2009). The affidavit may be based on information supplied to the affiant by an informant. MCL 780.653. If the informant is confidential and unnamed, the affidavit must contain "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." MCL 780.653(b).

Here, the informant had relevant personal knowledge because he had been in defendant's residence and he saw cocaine being sold there. The informant was also sufficiently credible and reliable because the informant had made over 80 controlled purchases in the past and each resulted in a positive test for a controlled substance. See *People v Echavarria*, 233 Mich App 356, 367; 592 NW2d 737 (1999). There was no error in the issuance of the search warrant because a reasonably cautious person could have concluded that there was a substantial basis for inferring a fair probability that contraband or evidence of a crime existed in defendant's residence. *Russo*, 439 Mich at 603; *Kazmierczak*, 461 Mich at 417-418.

Defendant also argues that the trial court abused its discretion in amending the information. "A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion." *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). A court may permit the prosecutor to amend the information unless the proposed amendment would prejudice the defendant. See *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993); see also MCR 6.112(H). A defendant is prejudiced when he is unfairly surprised, provided inadequate notice, or given an insufficient opportunity to defend. *Hunt*, 442 Mich at 364.

Defendant claims that the amendment of the information was prejudicial because it required him to defend against a new crime. Generally, a court may not amend an information to charge a new crime. See *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). After defendant admitted at trial that he held a gun approximately one and one-half to two months before the offense date in the information, the prosecution filed a motion requesting that the trial court amend the offense date. The trial court granted the motion and amended the offense date to include a period encompassing more than a month before the original offense date.¹

The date of the earlier incident was simply not pertinent to the crime charged, which involved a weapon found in the oven of the residence when the search warrant was executed. Thus, amending the information appears to have been outside the range of reasonable and principled outcomes. See *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006) (discussing the abuse-of-discretion standard). Nevertheless, defendant was not prejudiced by the trial court's decision to amend the offense date. The trial court made it clear that it was not basing its decision on the earlier incident during which defendant held a gun, because it recognized that the earlier incident involved a different gun. Because any error by the trial court in allowing the amendment of the information did not affect the outcome of defendant's trial, defendant is not entitled to reversal. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

¹ We note that amending the offense date in an information is not the same as charging a defendant with a new crime unless "time is of the essence." See *People v Taylor*, 185 Mich App 1, 7-8; 460 NW2d 582 (1990).

Defendant also argues that there was insufficient evidence to support his conviction of being a felon in possession of a firearm. “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). For purposes of this case, the elements of possession of a firearm by a felon were: (1) defendant possessed a firearm, (2) defendant was previously convicted of a felony, and (3) defendant’s right to possess a firearm had not been restored. See MCL 750.224f. The only challenged element on appeal is whether defendant possessed a firearm. Possession of a firearm may be proven by circumstantial or direct evidence. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Possession of a firearm may be actual or constructive. *Id.* at 470.

Defendant, Edna Davis (defendant’s mother), and Thomas Moore (for whom Davis provided care) lived in the residence. The trial court believed Davis when she testified that she did not know about the gun. “Questions of credibility are left to the trier of fact and will not be resolved anew by this Court.” *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). It can be inferred that Moore did not place the gun in the oven to frame defendant or Davis because evidence indicated that Moore was not the confidential informant who prompted the raid on the residence.² Also, Moore was not present at the time of the search. When defendant saw the police arrive at the residence, he stood up on the porch, quickly walked inside, and went into the kitchen. A gun was found in the oven in the kitchen, and the gun was not in the oven two days before the incident. We note that circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). The inference that defendant had the gun and hid the gun in the oven was sufficient to prove that defendant possessed the gun. *Hill*, 433 Mich at 470-471.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens

² Moore’s name was on the apartment’s lease.